

2000

Glenn C. Shaw v. Ashley L. Robison : Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GLENN C. SHAW,

Plaintiff-Appellant,

vs.

ASHLEY L. ROBISON,

Defendant-Appellant,

KOVO, INC., a Utah
corporation,

Defendant,

vs.

FIRST MEDIA CORPORATION,
a Delaware corporation,

Intervenor-Respondent.

No. 13823

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BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appeal from the District Court of Utah County,
the Honorable Allen B. Sorensen, Judge.

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Clark Supreme Court, Utah

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Plaintiff-Appellant,

vs.

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KOVO, INC., a Utah
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Civil No. 13823

Defendant,

vs.

FIRST MEDIA CORPORATION,
a Delaware corporation,

Intervenor-Respondent.

PETITION FOR REHEARING

POINT ONE. THIS COURT ERRED IN DETERMINING A
VALID CONTRACT FOR SALE WAS MADE PRIOR TO THE
TIME THE OWNERS RESOLVED THEIR DIFFERENCES.

One basis for appellant's petition for rehearing is
an apparent misunderstanding concerning the effect of the
trial court's February order and a failure to consider the
statements by the trial court considering the effect of

said order. This court stated:

". . . In February 1974, the court approved their recommendation of the receiver and directed him to proceed to accept the offer made by F.M.C. Pursuant thereto, the receiver entered into a contract with that company.

Although the receiver again moved the court to approve the contract, he did not need to do so in order to make a binding contract. . . .

Both F.M.C. and the receiver assumed that a final approval was necessary. However, the court had expressly directed the receiver to enter into a contract with F.M.C. (Advance sheet at page 3)

This court then concluded that after a contract of sale has been made, the owners ". . . ought not be permitted to defeat the rights of the purchasers by jointly asserting they have settled all differences." (Advance sheet at page 4)

In reaching the foregoing conclusion, the court recognized that in connection with judicial sales, where a sale is not regulated by statute, the trial court essentially makes its own rules subject to the use of sound discretion. Chapman vs. Schiller, 95 Utah 514, 83 P.2d 249, 251 (1938). This court also indicated a court may establish a procedure requiring judicial confirmation offers made to a receiver or may offer as a receiver to accept an offer on specific terms and thus obviate the need for further judicial action. Once however, a court has determined to follow a particular

procedure in making a judicial sale, it is obliged to adhere to its self-imposed rules.

In finding that the trial court, by its February order, had authorized the receiver to enter into a contract with the intervenor which was not subject to judicial confirmation, this court apparently overlooked the fact that the trial court itself intended that the contract was not to be binding until such took place.

This court failed to consider indications in the record that the trial court itself stated in March (after the order was entered) that by its February order the court had merely approved an order to negotiate, and had not approved any sale to intervenor. (R 310-311). See also Reply Brief of Appellants pages 15-22.

The trial court was charged with establishing a fair and orderly procedure for the judicial sale. Since the trial court itself, has indicated that no contract was approved or authorized by the February action, this court erred in determining that a binding contract had in fact been authorized. This court's determination that a binding contract was formed by the authority granted the receiver in the February order is also undermined by the fact that the trial court itself deemed it necessary to confirm and approve the contract at a much later date. Since the trial

court was charged with formulating the procedure to be employed in the judicial sale and because it itself indicated that a binding contract was not authorized by the February order, the trial court's action cannot be upheld on the basis that this court has utilized. The trial court must be required to adhere to the rules which it has itself established.

The review of Equity proceedings is indicated in Harding v. Harding, 26 Utah 2d 277 488 P.2d 308, 310 (1971).

In Equity proceedings:

" . . . It is the prerogative of the court to review the evidence, to make its own findings, and to substitute its judgment for that of the trial court when the ends of justice so require. However, due to the prerogatives and advantage position of the trial court, we pursue that broad authorization under certain rules of review which are now well established: its actions are indulged with the presumption of validity and correctness and the burden is upon the appellant to show a basis for upsetting them: either (1) that findings have been made when the events clearly preponderates the other way; or (2) there has been a misunderstanding or misapplication of the law resulting in substantial prejudicial error; or (3) that it appears plainly that there has been an abuse of discretion or inequality or injustice has resulted."

Regardless of which of the foregoing standards is applicable, since no contract was authorized by the February order, the action of the trial court was clearly improper. Because there was no contract, since the intervenor had notice of the limited nature of its rights prior to

confirmation and because the trial court expressly directed the owners to continue settlement negotiations, this court should not have affirmed the trial court action, particularly in light of the standard for review utilized in equity proceedings.

POINT TWO. THIS COURT ERRED IN DETERMINING THAT THE CONTRACT PRESENTED TO THE COURT FOR FINAL APPROVAL IN MAY, 1974 WAS THE SAME AS THE FEBRUARY PROPOSAL.

In its opinion this court stated:

"The final agreement provided that the attorneys would have to make certain certifications regarding title, etc. It was the same agreement which had been approved by the court on February 22, 1974, except for the mechanics of how it would be implemented."

As indicated previously in this petition for rehearing, it is appellant's position that the court did not authorize an agreement by its February action as demonstrated by the subsequent actions of the trial court itself. In the event, however, that this court is not persuaded to that effect as a result of this petition for rehearing it should at a minimum take steps to protect the interests of the owners since it is evident that the agreement submitted to the trial court in June, 1974 contains many substantial changes from the February proposal which are highly prejudicial to the rights of the owners.

Even if, as this court determined, the owner's differences were resolved too late to preclude the intervenor from obtaining certain rights, the owners at a minimum were entitled to a fair price for their interests in accordance with the February proposal. The agreement approved by the trial court simply does not accord to the owners this protection.

Appellants have previously made a detailed comparison of the changes between the February proposal and the later contract which demonstrate beyond question that the subsequent contract does not comport with the earlier February proposal in numerous particulars that are unfair to the owners. This is demonstrated by the comparison of the February proposal (R-141-144) with a completed contract (R-189-259) as the major differences are highlighted by the appellant's summary (R-387).

Particularly onerous is the \$75,000.00 escrow provided for in the completed contract but never mentioned or even alluded to in the February proposal. The escrow agent is to hold the funds for up to two years after the closing (R-390). Since the closing will not take place until after FCC approval, (a procedure which takes from four to six months), the owners will be deprived of a significant portion of the

purchase price for an inordinate period of time. The sale, however, is structured in a manner most advantageous to the intervenor. The sale is structured in a manner that will require the owners to immediately pay all appropriate taxes on the entire gain realized from the transaction. But because of the onerous escrow agreement the owners will be hardpressed to pay these taxes and will be precluded from going into any other business. Additionally, all interest on investment proceeds during the escrow period will be the property of the intervenor. Other of the burdensome and unfair changes are apparent from a comparison of appellant's summary with the proposal and contract.

This court's ruling requiring the owners to sell their interest to intervenor was predicated upon the determination that the owner's settlement had been reached after the intervenor had acquired rights in the radio station's assets and it would not be fair to the intervenor to negate the sale. The owners, however, still must be deemed to have some rights in the matter. Permitting the sale to take place in a manner imposing an unfair burden on the owners by precluding them from taking advantage of other business opportunities and forcing them to pay taxes on a sale before they have actually realized a significant portion of the proceeds is not in accordance with the February proposal. This

result was neither contemplated nor proposed in the February documents. It is unfair and unjust to impose this result upon the owners simply because they have been found to have not made a timely resolution of their outstanding differences.

CONCLUSION

Appellant submits the trial court established a procedure for conducting the judicial sale which required confirmation of the contract made by the receiver. Having established such a procedure, the trial court could not later take action consistent with this procedure. It is not proper for this court to condone the trial court's disregard of its own procedure.

Assuming the intervenor did require rights prior to the time the owners settled their outstanding differences, such rights were defined by the February proposal. The completed contract contains onerous and unfair terms not included in the February proposal. At a minimum, the owners are entitled to a contract which fairly and consistently comports to the February proposal. Appellant submits that a rehearing of this matter is justified on both grounds.

Respectfully submitted,

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